

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 30, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 2012AP2523-CR
2012AP2524-CR**

**Cir. Ct. Nos. 2011CF23
2011CF659**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TRAVIS J. HUSS,

DEFENDANT-APPELLANT.

APPEALS from judgments of the circuit court for Outagamie County: MITCHELL J. METROPULOS, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Travis Huss appeals judgments, entered upon his no contest pleas, convicting him of operating while intoxicated sixth offense and operating while intoxicated seventh offense. Huss argues the circuit court erred in

both cases by rejecting his collateral attack on three of his prior OWI convictions. We disagree and affirm the judgments.

¶2 After the State charged Huss with OWI-sixth and OWI-seventh, Huss moved to collaterally attack three prior OWI convictions. Huss claimed he did not knowingly, voluntarily and intelligently waive his right to counsel in those previous cases. The Sixth Amendment secures to a defendant facing incarceration the right to counsel at all critical stages of the criminal process. *Iowa v. Tovar*, 541 U.S. 77, 87 (2004). Although a defendant may waive his or her right to counsel, the waiver must be knowing, intelligent and voluntary to be constitutionally valid. *State v. Klessig*, 211 Wis. 2d 194, 203-04, 564 N.W.2d 716 (1997). Therefore, when a defendant expresses a desire to proceed without counsel, the circuit court must conduct a colloquy to ensure that the defendant: (1) made a deliberate choice to proceed without counsel; (2) was aware of the difficulties and disadvantages of self-representation; (3) was aware of the seriousness of the charge or charges; and (4) was aware of the general range of possible penalties. *Id.* at 206.

¶3 A defendant may collaterally attack a prior conviction in an enhanced sentence proceeding on the ground that he or she was denied the constitutional right to counsel in an earlier case. *State v. Hahn*, 2000 WI 118, ¶17, 238 Wis. 2d 889, 618 N.W.2d 528. In order to do so, a defendant must make a prima facie showing that his or her constitutional right to counsel was violated by pointing “to facts that demonstrate that he or she did not know or understand the information which should have been provided in the previous proceeding and, thus did not knowingly intelligently, and voluntarily waive his or her right to counsel.” *Id.* (internal quotations omitted). If a prima facie showing is made, the burden shifts to the State to prove by clear and convincing evidence that the

defendant in fact possessed the constitutionally required understanding to knowingly, intelligently, and voluntarily waive the right to counsel. *Id.*, ¶27. Whether a defendant has made a prima facie showing that his or her right to counsel was violated in an earlier proceeding is a question of law that we review independently. *Id.*, ¶10.

¶4 Here, Huss does not argue he was unaware of the difficulties and disadvantages of self-representation, the seriousness of the allegations or the potential penalties. He asserts, however, that his decision to proceed without counsel in the three prior OWI cases was not “deliberate” because he was never told about the process for seeking court-appointed counsel paid by the county pursuant to *State v. Dean*, 163 Wis. 2d 503, 471 N.W.2d 310 (Ct. App. 1991). Huss’s argument, however, was rejected by this court in *State v. Drexler*, 2003 WI App 169, 266 Wis. 2d 438, 669 N.W.2d 182.

¶5 There, as here, Drexler attempted to collaterally attack a prior OWI conviction, asserting he could not make a “deliberate choice to proceed without counsel” because the trial court in a prior case did not advise him that if he failed to qualify for a public defender, the court could appoint counsel paid for by the county. *Id.*, ¶9. The *Drexler* court disagreed, holding:

[T]he trial court is only obligated to advise a defendant of the right to counsel; the trial court is not required to conduct a colloquy before accepting a waiver of counsel that includes specific advice to a defendant that the right to appointed counsel is broader than the right to counsel provided by the state public defender and includes the right to counsel appointed by the court and paid for by the county.

Id., ¶1.

¶6 To the extent Huss attempts to distinguish *Drexler*, we are not persuaded. Drexler argued he could not make a deliberate choice to proceed without counsel because the circuit court failed to inform him of the possibility of appointed counsel under *Dean*. Huss argues he could not make a deliberate choice to proceed without counsel because he did not know about the possibility of appointed counsel under *Dean*. Huss fails to establish any meaningful difference between these two arguments—they both involve a purported lack of knowledge impacting the deliberate choice to proceed without counsel. To the extent Huss cites a federal case regarding contracts and another involving the voluntariness of a confession to support his argument, citation to these federal cases does not overcome *Drexler*, which is directly on point.

By the Court.—Judgments affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

